Yang Lak Man v Yang Paw Man

HIGH COURT (TEMERLOH) — CIVIL SUIT NO 24–30 OF 1999
MOHD HISHAMUDIN J
26 JULY 1999

Civil Procedure *— Affidavits — Affidavit in support of originating summons — Affidavit affirmed before originating summons was filed — Whether affidavit defective — Rules of the High Court 1980 O 41 rr (1) & (2)*

The plaintiff filed an originating summons on 1 March 1999 which was supported by an affidavit affirmed on 8 February 1999. The issue was whether the affidavit is defective because it was affirmed before the originating summons was filed.

Held:

It cannot be said that O 41 r 1(1) and (2) of the Rules of the High Court 1980 either expressly or by implication require the affirming of a supporting affidavit to be done only after the originating summons has been filed and not before (see p 623F–G); *Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali* [1999] 5 MLJ 629 followed. To insist that a supporting affidavit for an originating summons be affirmed only after the originating summons has been filed in court, would be not only contrary to established contemporary legal practice but would also cause unnecessary confusion and hardship to litigants (see p 624C–D); *Ban Hin Lee Bank v Pang Lai Hin* [1999] 2 MLJ 234 not followed.

[Bahasa Malaysia summary

Plaintif telah memfailkan saman pemula pada 1 Mac 1999 yang disokong oleh afidavit yang diikrar pada 8 Februari 1999. Isu adalah sama ada afidavit tersebut adalah cacat oleh kerana ia diikrarkan sebelum saman pemula difailkan.

Diputuskan:

Tidak boleh dikatakan bahawa A 41 k 1(1) dan (2) Kaedah-Kaedah Mahkamah Tinggi 1980 secara nyata atau tersirat memerlukan afidavit sokongan diikrarkan hanya selepas saman pemula difailkan dan bukan sebelumnya (lihat ms 623F–G); *Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali* [1999] 5 MLJ 629 diikut. Untuk menegaskan bahawa suatu afidavit sokongan untuk suatu saman pemula diikrarkan hanya selepas saman pemula difailkan di mahkamah, bukan sahaja bercanggah dengan amalan guaman yang mantap, tetapi juga membangkitkan kekeliruan dan juga kesusahan kepada para peguam (lihat ms 624C–D); *Ban Hin Lee Bank v Pang Lai Hin* [1999] 2 MLJ 234 tidak diikut.]

Notes

For cases on affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

Cases referred to

Arab Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor [1999] 1 AMR 118 (refd)

Ban Hin Lee Bank v Pang Lai Hin [1999] 2 MLJ 234 (not folld)

Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali [1999] 5 MLJ 629 (folld)

Legislation referred to

Rules of the High Court 1980 O 6 r 6(3), O 7 r 5, O 41 rr (1), (2)

KC Wai (*KC Wai & Associates*) for the plaintiff.

Richard Bong (*Bong & Co*) for the defendant.

Cur Adv Vult

Mohd Hishamudin J: The originating summons (encl 4) is an application by the plaintiff for an order that the defendant do deliver to him the issue document of title of a piece of land, in respect of which the plaintiff is a co-proprietor, so as to enable him to transfer his share in the land to his son.

This application is supported by an affidavit (encl 3) affirmed by one Hong Tuai King on 8 February 1999. This supporting affidavit together with the originating summons (encl 4) was filed in court on 1 March 1999.

At the commencement of the hearing of this originating summons, the learned counsel for the defendant, En Richard Bong, raises a preliminary objection. The objection taken is against the supporting affidavit (encl 3). It is contended by En Bong that the affidavit is defective and should be disallowed. The learned counsel argues that the affidavit is defective because it was affirmed before the originating summons was filed. According to En Bong, the supporting affidavit could only be affirmed after the originating summons has been filed in court.

Encik Bong relies on O 41 r 1(1) and (2) of the Rules of the High Court 1980 ('the RHC'), which stipulates:

> (1) Subject to paragraphs (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
>
> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.

Ban Hin Lee Bank v Pang Lai Hin [1999] 2 MLJ 234 was cited in support of the contention. In this case cited, the supporting affidavit was affirmed on 22 June 1998 whereas the originating summons was filed on 24 June

1998. Kamalanathan Ratnam J was of the view that the affidavit should be disallowed. The learned judge based his decision on a previous decision of his in *Arab Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1999] 1 AMR 118. In the latter case, the affidavit was affirmed one week before the originating summons was filed. The learned judge, referring to O 41 r 1 of the RHC, disallowed the affidavit on the grounds that (to quote what was said, at p 240E–F):

> In other words, an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is vital factor that must be present ... the said affidavit cannot be said to have been affirmed in a cause or matter because, properly speaking, there was no cause or matter that had been registered at the Registry.

The learned judge went on to hold:

> ... in the present case, where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view, it is a nullity as it supports a non-existent cause or matter.

En KC Wai, for the plaintiff, on the other hand, maintains that the supporting affidavit is proper, although it was affirmed earlier than the filing of the originating summons. He maintains that what is important is that the supporting affidavit should be filed together with the originating summons, as was duly done in the present case. In support of his argument, he cites *Hongkong Bank (M) Bhd v Nor Harizan bte Mohd Ali* [1999] 5 MLJ 629. There, Azhar J took a view different from that of Kamalanathan Ratnam J in *Ban Hin Lee Bank*. The learned judge held:

> Swearing of an affidavit that bears no registration number of the case as the originating process has not begun does not violate any provision of the law as it stands. To hold otherwise would undoubtedly result in grave hardship and unnecessary inconvenience to the parties concerned.

With respect, I share the view as expressed by the learned judge in *Hongkong Bank*. On my part, I have nothing more to add to what has been expressed by Azhar J except just to stress that, having scrutinized O 41 r 1(1) and (2), I simply fail to see in what way it could justifiably be said that the said provisions, either expressly or by implication, require the affirming of a supporting affidavit to be done only *after* the originating summons has been filed and not before. It is, I concede, true that an affidavit affirmed *before* the originating summons is filed would not carry the originating summons serial number *as yet*. But then this omission, at the time of the affirmation, is understandable, and should not, in my mind, be a matter of grave concern. For the serial number would in due course (when the originating summons together with the supporting affidavit are filed in court), partly as a matter of procedural law (O 6 r 6(3) read together with O 7 r 5 of the RHC), and partly as a matter of hitherto accepted practice, be given by the registrar and thereafter inserted by the relevant officer of the court in the title (as a matter of practice, at the time of filing, the reference to the serial number in the title

would be left blank in the form 'Originating Summons No: ...') of both the originating summons as well as the supporting affidavit.

Another thing that I wish to add is that, in my humble view, it is unfair to overemphasise the importance of the serial number of a supporting affidavit in respect of a *nascent* (that is, a pre-presented) originating summons. The serial number, as we are all aware, is only one of the components or parts of the title of the action. There are other equally important components of the title, that is, the name of the High Court where the action is filed, the name of the parties to the action, and the subject matter of the action (expressed in the form of '(In the matter of ...)'), as illustrated by Azhar J (at p 633A–E) in *Hongkong Bank*.

Finally, I share the sentiment as expressed by the learned judge in *Hongkong Bank* that, to insist that a supporting affidavit for an originating summons be affirmed only *after* the originating summons has been filed in court, would be not only contrary to establish contemporary legal practice but would also cause unnecessary confusion and hardship to litigants.

Accordingly, the preliminary objection is overruled.

Preliminary objection dismissed.

Reported by Benjamin Yong